

**SUPREME COURT  
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

GREAT LAKES INSURANCE SE, )  
Petitioner, )  
v. ) No. 22-500  
RAIDERS RETREAT REALTY CO., LLC, )  
Respondent. )

Pages: 1 through 78

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1           IN THE SUPREME COURT OF THE UNITED STATES  
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3   GREAT LAKES INSURANCE SE,                    )  
4                           Petitioner,                    )  
5                           v.                                ) No. 22-500  
6   RAIDERS RETREAT REALTY CO., LLC,            )  
7                           Respondent.                    )  
8   - - - - -

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11                           Washington, D.C.  
12                          Tuesday, October 10, 2023  
13

14           The above-entitled matter came on for  
15   oral argument before the Supreme Court of the  
16   United States at 11:34 a.m.

17  
18   APPEARANCES:  
19   JEFFREY B. WALL, ESQUIRE, Washington, D.C.; on behalf  
20       of the Petitioner.  
21   HOWARD J. BASHMAN, ESQUIRE, Fort Washington,  
22       Pennsylvania; on behalf of the Respondent.

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24  
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1 P R O C E E D I N G S

2 (11:34 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 22-500, Great Lakes  
5 Insurance versus Raiders Retreat Realty.

6 Mr. Wall.

7 ORAL ARGUMENT OF JEFFREY B. WALL

8 ON BEHALF OF THE PETITIONER

9 MR. WALL: Mr. Chief Justice, and may  
10 it please the Court:

11 In The Bremen and Carnival, this Court  
12 held that forum-selection clauses in maritime  
13 contracts are enforceable as a matter of federal  
14 law, except in the rare circumstances when they  
15 violate federal maritime policy.

16 Almost all federal courts, including  
17 all of the major maritime courts, have taken the  
18 same approach for choice-of-law clauses. This  
19 Court should do the same for three reasons.

20 First, logic and consistency. We're  
21 here talking about a federal exception to a  
22 federal presumption of enforceability. It  
23 stands to reason that federal exception would  
24 look to federal public policy, not state public  
25 policy. Raiders doesn't point to any analogous

1 federal exception. It looks to state public  
2 policy. And it doesn't explain why choice of  
3 law in maritime should be any different from  
4 forum selection in maritime.

5           Second, the consensus approach makes  
6 practical sense for the reasons that this Court  
7 gave in *The Bremen*. Judging choice-of-law  
8 clauses by reference to a uniform body of  
9 federal law accords with ancient concepts of  
10 freedom of contract, and it allows parties to  
11 gauge and price their risks knowing what law  
12 will apply to their contracts. If 50 states may  
13 set aside parties' choices based on their own  
14 public policies, that would be a reference for  
15 uncertainty and forum shopping.

16           Third, the consensus approach is clear  
17 and administrable. On our approach, a federal  
18 court would ask, does a choice-of-law clause  
19 offend federal admiralty policy? The answer to  
20 that question will almost always be no. On  
21 *Raiders'* approach, the Court would ask, what's  
22 the state with the greatest interest in the  
23 dispute? Does that state have a public policy  
24 with respect to the specific question at issue?  
25 And is that public policy fundamental?

1                   So, for instance, you could have a  
2     Florida district court asking whether  
3     Pennsylvania has a fundamental public policy  
4     sufficient to overcome the application of New  
5     York law. The answer to that will almost always  
6     be hazy, and that lack of clarity would disserve  
7     the admiralty world and federal courts.

8                   I welcome the Court's questions.

9                   JUSTICE THOMAS: Mr. Wall, what does  
10    -- what effect does Wilburn Boat have on your  
11    argument?

12                  MR. WALL: So I think you have to take  
13    Wilburn Boat as part of the background law.  
14    Wilburn Boat was a watershed decision, to be  
15    sure, and said state law occupies the space when  
16    there is no well-established rule of admiralty  
17    or no need to create one.

18                  But this Court saw no tension with  
19    Wilburn Boat in The Bremen or Carnival, where it  
20    said either there's a well-recognized rule in  
21    admiralty or we think we need to create one,  
22    whichever one the Court was doing, when it said  
23    forum-selection clauses are generally  
24    enforceable as a matter of federal law.

25                  So I see no tension between those two

1 things. The question just remains there was The  
2 Bremen -- the Court in The Bremen perceived  
3 either a recognized room in admiralty for forum  
4 selection or a need to create one. And so the  
5 only question here is, should we have the same  
6 rule for choice-of-law clauses? I can't think  
7 of a single good reason why you would  
8 distinguish between the two.

9 If anything, I would think it would be  
10 easier on the choice-of-law side because the  
11 forum-selection question can really affect the  
12 parties' practical ability to litigate. The  
13 choice-of-law question is just, once you reach  
14 the forum, what law will the parties apply?

15 It is worth noting, though, that it's  
16 not as if, you know, Great Lakes picked out here  
17 South Dakota law or Mongolian law. I mean, they  
18 picked out New York law. That's a common choice  
19 among both marine insurers generally and --

20 JUSTICE KAVANAUGH: If we --

21 MR. WALL: -- surplus lines insurers.

22 JUSTICE KAVANAUGH: -- if we agree  
23 with you that there's a federal presumption and  
24 that federal law defines the content of the  
25 exception -- so assume just for the question

1     that -- what then is the content of the federal  
2     exception? I think the briefs kind of dance  
3     around with a few different formulations.

4             First of all, the Restatement. Is  
5     that relevant?

6             MR. WALL: So --

7             JUSTICE KAVANAUGH: Particularly  
8     Restatement 187(2)(b). I think you think that's  
9     out altogether, I think.

10            MR. WALL: So I don't think that's  
11     right, Justice Kavanaugh. Just to take a step  
12     back, I think The Bremen did this exactly right.  
13     So, if it's narrow decision day, I mean, I think  
14     it's just --

15            (Laughter.)

16            MR. WALL: -- the Third Circuit kind  
17     of got one little piece of The Bremen wrong.  
18     The Bremen said --

19            JUSTICE KAVANAUGH: Well, assume it's  
20     not -- that we're trying to figure this out. So  
21     -- yeah.

22            MR. WALL: So I'm good with first  
23     principles. So The Bremen says, look, is there  
24     fraud in the formation of the contract? Is  
25     there a formation problem?



1 JUSTICE KAVANAUGH: Yeah.

2 MR. WALL: Okay. Set that to the  
3 side. No formation problem.

4 Now generally enforceable unless  
5 unreasonable or unjust, and what does that mean?  
6 And The Bremen says -- citing the parallel  
7 section of the Restatement for forum selection,  
8 says two things. One, if it's contrary to  
9 public policy; and, two, it says maybe if  
10 there's no substantial connection to the chosen  
11 law or no reasonable basis for choosing that  
12 law.

13 I think the court of appeals got --

14 JUSTICE KAVANAUGH: So --

15 MR. WALL: -- all of that right.

16 JUSTICE KAVANAUGH: -- so the marine  
17 underwriters' amicus brief, which supports you  
18 but says that's no good, the substantial  
19 connection point, because they say that  
20 oftentimes sophisticated parties in this context  
21 are going to choose a neutral forum to which  
22 neither might have a substantial connection, so  
23 I just want to make sure.

24 And they see more generally the don't  
25 do the Restatement, don't just do the point you

1     made about if the state law offends federal  
2     admiralty policy, then, okay, but otherwise,  
3     don't do the Restatement. That seems to be  
4     their position. I want to make sure you're  
5     clear on that.

6                 MR. WALL: I think it's a little more  
7     nuanced than that, Justice Kavanaugh. What The  
8     Bremen says and what the Restatement says in  
9     that prong is -- and The Bremen cites this, I  
10    think, faithfully -- it says no substantial  
11    connection or no reasonable basis.

12                And what the marine underwriters say  
13    is some courts, in picking that up, have just  
14    done the substantial connection and not looked  
15    to the reasonable basis.

16                As long as you say that even if you're  
17    not connected to New York, though the parties  
18    were here, that that's a perfectly reasonable  
19    law --

20                JUSTICE KAVANAUGH: Okay.

21                MR. WALL: -- for sophisticated  
22    parties to pick, in maritime or, frankly, out of  
23    maritime, then I think --

24                JUSTICE KAVANAUGH: And it's "or  
25    reasonable basis."

1                   MR. WALL:  It's "or reasonable basis."  
2   Then it's fine.

3                   JUSTICE KAVANAUGH:  It's not -- to  
4   pick up last week, it's not "and reasonable  
5   basis."

6                   MR. WALL:  That's right.

7                   JUSTICE KAVANAUGH:  Yeah.

8                   MR. WALL:  And The Bremen got all of  
9   this right.  I mean, the only place where the  
10   court of appeals went wrong was it said, okay,  
11   public policy can be one of the things that  
12   makes it unreasonable, unjust.  Whose public  
13   policy?  We look to the state, which isn't what  
14   The Bremen did.  And it doesn't make a lot of  
15   sense.

16                   If you think there's a presumption of  
17   enforceability, then federal law cares about  
18   generally having them enforced.  When would it  
19   not want that to be true?  Well, when it  
20   disserves the purposes of maritime, not when it  
21   disserves one of the 50 states' idiosyncratic  
22   public policies.

23                   JUSTICE KAGAN:  Well, possibly, except  
24   that's where you get to Justice Thomas's view of  
25   -- of -- of, you know, asking you about Wilburn,

1     because Wilburn seemed to say something  
2     different. Wilburn seemed to say, you know,  
3     even when you're trying to figure out what the  
4     federal law should be in this area, I mean,  
5     federal law often says, well, the states have an  
6     extremely important role to play, and so it  
7     should be a state rule of decision. That's a --  
8     a federal rule that it should be a state rule of  
9     decision.

10                 That's essentially what Wilburn said  
11     in the insurance -- maritime insurance context.  
12     And most of your brief seems to be an effort to  
13     run away from that aspect of Wilburn repeated  
14     over and over and over again, which is, when it  
15     comes to maritime insurance, states have long  
16     regulated the area and strongly regulated the  
17     area, and the federal rule is that we should  
18     allow that to continue.

19                 MR. WALL: So two things, Justice  
20     Kagan. I understand that argument, and I think  
21     it has more force on the sort of new front-line  
22     position.

23                 But, if the Court's accepting that on  
24     the narrow question it granted there is a  
25     federal presumption of enforceability and we're

1 just trying to figure out how to work the  
2 exception, then I think we sort of already  
3 passed Wilburn Boat because we have now a  
4 well-established federal rule. It's a  
5 presumption of enforceability. And we're just  
6 trying to figure out do -- what did The Bremen  
7 mean when it said public policy, what does the  
8 Restatement mean. And we're sort of past  
9 Wilburn Boat.

10 I -- I take the point more generally  
11 that --

12 JUSTICE KAGAN: I don't really think  
13 so in anything other than a highly technical  
14 way. What Wilburn Boat said is that in crafting  
15 the exceptions to this presumption, you should  
16 take into account that states have long  
17 regulated maritime insurance and that they  
18 should continue to do so.

19 MR. WALL: So I -- I don't think  
20 that's quite right, Justice Kagan. It doesn't  
21 say anything about sort of how you work federal  
22 rules and once you have them in admiralty. It  
23 says, if you have a rule in admiralty, you  
24 follow it or if you need to create one. And we  
25 can debate whether The Bremen was recognizing an

1     acknowledged rule or creating one. I think it's  
2     possible to read the decision either way.

3             And then Wilburn Boat tells you, if  
4     you don't have the federal rule or a need to  
5     create a uniform rule in order to serve the  
6     purposes of admiralty, state law does all the  
7     work there.

8             But you're right, there's a lot of  
9     other sort of language and dicta about the --  
10    the historical role that states have played with  
11    regard to regulating marine insurance, and --  
12    and I'm not sort of here dickering with any of  
13    that, except to say The Bremen and Carnival  
14    didn't see any of that as a barrier to  
15    recognizing or creating a uniform federal rule  
16    for forum selection.

17            I don't take the other side to be  
18    disputing that or saying those decisions should  
19    be overruled. And so the question just is, all  
20    right, we have that rule in admiralty which  
21    applies to forum selection causes across the  
22    board, all maritime contracts. It doesn't  
23    matter whether they're marine insurance or not.

24            Should we have the same system for a  
25    choice-of-law clause when those clauses

1 typically travel together in maritime contracts  
2 like this one? And I don't really think Wilburn  
3 Boat has much to say on that question.

4 CHIEF JUSTICE ROBERTS: Your -- your  
5 argument, I take it, is that there is an  
6 established federal maritime rule not simply on  
7 choice-of-law provisions but, I don't know, the  
8 Uberrimae Fidei doctrine, in other words, that  
9 even if your boat runs aground, you know, if you  
10 didn't have the fire extinguisher, you know,  
11 updated, you -- you lose.

12 What if there weren't an established  
13 maritime policy on that specific doctrine?

14 MR. WALL: So a -- a couple of things,  
15 Mr. Chief Justice. I don't know that Uberrimae  
16 Fidei is the sort of rule that's triggered here  
17 as much as strict enforcement of the warranties.

18 It is true that post-Wilburn Boat,  
19 some of those, like Uberrimae Fidei or  
20 Navigational Limits, courts have almost  
21 uniformly said are controlled by federal law  
22 because they were well-established rules in  
23 admiralty.

24 Some of the others, like Named  
25 Operator or Fire Extinguisher, they've left to

1 state law. That's the substantive state law.

2 So it is true that post-Wilburn Boat  
3 federal law is going to control some of the  
4 contractual provisions. State law will control  
5 others. But I don't think it makes any  
6 difference to our argument, which is that the  
7 question here is about the enforceability of a  
8 choice-of-law clause, and on that, there is a  
9 well-established rule.

10 I mean, we have everything --

11 CHIEF JUSTICE ROBERTS: Well, I wonder  
12 if it --

13 MR. WALL: -- but --

14 CHIEF JUSTICE ROBERTS: I was just  
15 going to say -- sorry to interrupt -- but, I  
16 mean, certainly, the argument can be made -- and  
17 I -- I think it's the argument of your friend on  
18 the other side -- that Wilburn Boat is expressly  
19 designed to do what you indicated that it  
20 doesn't matter, which is, if you have a very  
21 particular question like how the insurance  
22 policy should be interpreted, and there's no  
23 federal rule. There are general federal rules  
24 about choice-of-law, you know, but not the  
25 particular question there.



1                   And on that question, under Wilburn  
2   Boat, you do look to state law.

3                   MR. WALL:  I -- I agree with that, Mr.  
4   Chief Justice.  On the breach of the fire  
5   extinguisher warranty in the policy, that's  
6   going to go to state law.  The question is,  
7   which state law?  Do we give effect to the  
8   choice-of-law clause?

9                   And there is a rule on choice-of-law  
10   clauses in admiralty, and it's as  
11   well-established as it can be absent a  
12   pronouncement from this Court.  It goes back to  
13   London Assurance and Kensington in 1897 and  
14   1902.

15                  Then you find this Court saying it for  
16   forum selection in Bremen and Carnival.  Then  
17   you have virtually every federal court,  
18   including the Fifth and the Ninth Circuits and  
19   all the major maritime district courts, adopting  
20   it for choice-of-law.

21                  It is as well-established in admiralty  
22   as it can be absent a decision of this Court.

23                  JUSTICE BARRETT:  Did Raiders concede  
24   that below?  I mean, it kind of seems that the  
25   way this case was litigated is that everyone

1     assumed and kind of took as a given that there  
2     was this well-established federal rule that  
3     choice-of-law clause -- clauses were  
4     presumptively enforceable, and it has changed  
5     its position now. But, below, am I right that  
6     Raiders took that as a given?

7             MR. WALL: Yes. And -- but that's --  
8     it -- it's not just about Raiders, Justice  
9     Barrett. It's just a reflection of the way  
10    these cases are litigated. Every one for  
11    decades has taken it as a given that The Bremen  
12    applies with respect to forum selection and  
13    choice-of-law.

14            And everybody had been thinking  
15    federal public policy. And then they made the  
16    argument about state public policy, and in our  
17    view, the Third Circuit got that wrong.

18            But everybody had been doing this  
19    within the framework of the -- The Bremen just  
20    for maritime contracts for forum selection for  
21    choice-of-law, and so everybody thought there  
22    was a federal presumption across the board. And  
23    then it was just, what are the exceptions to the  
24    presumption?

25            JUSTICE ALITO: And, Mr. Wall, there's

1 a -- a wonderful line in your brief. Now this  
2 is a -- a case about a yacht that ran aground,  
3 and when the claim is filed, your client denies  
4 the claim because you say they didn't do what  
5 they were supposed to do regarding fire  
6 extinguishers.

7 But there was no fire. The -- the  
8 absence of fire extinguishers up to your  
9 standards had nothing whatsoever to do with  
10 this. And so you have this line -- and so to  
11 deny coverage on that ground does seem harsh,  
12 but you say: Although that denial may seem  
13 harsh to the land-bound, it reflects traditional  
14 maritime principles.

15 Now, if I were not land-bound, suppose  
16 I -- you know, I -- I spent a lot of time  
17 sailing around the world on ships, it wouldn't  
18 seem harsh to me anymore?

19 MR. WALL: It would not if you were a  
20 member of the admiralty bar as I've come to  
21 understand. Justice Alito, I've always been  
22 worried about this because it struck me as harsh  
23 too when I approached the case. There is a  
24 different tradition that grew up around the  
25 admiralty system and Lloyd's of London.

1 JUSTICE ALITO: Yeah. I know there  
2 are a lot of things about old-time maritime law  
3 that are very harsh, like we had a case a few  
4 years ago about maintenance and cure of seamen,  
5 and we had cases -- we had a case involving a --  
6 a sailer who got a fractured skull shortly after  
7 leaving port, and then the captain refused --  
8 made the entire journey, refused to put the  
9 person aboard -- ashore at any port to get  
10 medical treatment, waited until the person came  
11 home.

12 So I -- I mean, I don't know about --

13 MR. WALL: And no punitive damages.  
14 But the reason for this, Justice Alito, is that  
15 you had international insurers located overseas  
16 who had no way of monitoring these vessels or  
17 incentivizing compliance.

18 And so this tradition grew up and it's  
19 very different from what we think of a car  
20 insurance or home insurance, where you pay your  
21 premiums and they process the claims in the  
22 pool. These are sort of specialized policies.

23 And -- and so just to put a little  
24 finer point on it, Great Lakes is a surplus  
25 lines insurer. I didn't know what that was

1 before, but it turns out you go to them when  
2 your other insurers won't take you.

3 So you can't get your boat policy from  
4 Progressive or GEICO, may be risky, may be, as  
5 here, the boat is very expensive, you want a big  
6 policy, so it's a sort of -- it's a unique  
7 transaction that others in the market don't do.  
8 There aren't many of them.

9 And they have to price these things  
10 and they price them by taking into account that  
11 you will have to comply with the warranties,  
12 which is why, here, you can get a million  
13 dollars of coverage on a half-million-dollar  
14 yacht for a premium of about \$9,000 a year.  
15 That's the policy --

16 JUSTICE ALITO: All right.

17 MR. WALL: -- in the record.

18 JUSTICE ALITO: So suppose this --  
19 this choice-of-law clause were modified, and the  
20 phrase, "the substantive laws of the State of  
21 New York" were deleted, and in its place were  
22 put -- was put "the substantive laws of some  
23 fall" -- "some little country that has the most  
24 pro-insurer law you can possibly imagine."

25 So any claim has to be submitted on a

1 very long form and there are specifications  
2 about the font and the spacing of the letters  
3 and the -- and the claim is to be rejected if  
4 there -- if there are any typos or any smudges  
5 on the claim form, and it has to be filed within  
6 12 hours of the -- of the incident. And so the  
7 Court is confronted with this choice-of-law  
8 issue.

9 What would the Court do?

10 MR. WALL: On the assumption that  
11 there's no other really good reason for  
12 sophisticated parties to pick that law, it's not  
13 going to be enforceable. I mean, and the oddity  
14 of this case is --

15 JUSTICE ALITO: Based on what  
16 principle?

17 MR. WALL: On the -- the first of the  
18 two prongs in the Restatement. You would say  
19 they didn't have any substantial connection to  
20 Andorran law or Mongolian law, what have you,  
21 and --

22 JUSTICE ALITO: Well, let's say that  
23 the insurer --

24 MR. WALL: -- and there's no  
25 reasonable basis --

1 JUSTICE ALITO: -- the insurer is  
2 located in -- in this little country. So  
3 there's a connection.

4 MR. WALL: So, if the insurer is  
5 located in that country, there may well --  
6 they -- there's definitely a substantial  
7 connection to that law, and it -- it's likely  
8 there's a reasonable basis for picking it.

9 And it -- it seems to me that we  
10 shouldn't be too unworried about -- too worried  
11 about sort of unfairness because you're talking  
12 about people who can't otherwise get insurance  
13 in the market. There are very few people that  
14 will write the insurance. They're on notice of  
15 the clause, and if we thought that were a  
16 problem from Bremen, then we have Carnival --

17 JUSTICE JACKSON: Can --

18 MR. WALL: -- saying on the  
19 forum-selection side it doesn't matter if it's a  
20 contract of adhesion; we have good rules for  
21 enforcing this across the board.

22 JUSTICE BARRETT: But --

23 JUSTICE JACKSON: Mr. Wall, can --

24 JUSTICE BARRETT: -- wouldn't --

25 JUSTICE JACKSON: -- can I just ask

1     you, because I was a little surprised about your  
2     reliance on The Bremen under the Wilbur --  
3     Wilburn Boat standard. I understand that step 1  
4     is that it has to be an established federal  
5     rule, but I also thought that the rule that you  
6     are asking be recognized as such in this context  
7     has never been laid down by this Court in the  
8     choice-of-law context. The Bremen was forum  
9     selection.

10                 So can you just help me to understand  
11     how we know that there's an established federal  
12     rule in the choice-of-law world?

13                 MR. WALL: Well, there wasn't an  
14     established rule laid down by this Court  
15     pre-Bremen either, Justice Jackson. And what  
16     the Court said in The Bremen was we -- all of  
17     the purposes of maritime -- the need for  
18     uniformity, predictability, facilitating the  
19     free flow of national and international commerce  
20     -- all of those things lead us to say that  
21     forum-selection clauses should be generally  
22     enforceable as a matter of federal law.

23                 So I think, here, you are right  
24     there's no decision from this Court on choice of  
25     law, but you have a uniform history in the lower



1 courts, you have a virtual consensus among all  
2 the present-day courts, all the major maritime  
3 ones, and you already have Bremen and Carnival.

4 So you already know what the rule is  
5 with respect to forum selection, and it's thus,  
6 I think, an even easier question here.

7 JUSTICE JACKSON: You see no  
8 difference between forum selection and choice of  
9 law with respect to these issues?

10 MR. WALL: I do but not in a way that  
11 helps Raiders. I mean, historically, what  
12 courts were skeptical of was forum selection  
13 because they thought you picked the foreign  
14 forum and then forced the parties to go litigate  
15 there, which was effectively trying to deprive  
16 them of their ability to access the forum. But  
17 courts were not so hostile to parties picking  
18 choice of law.

19 And so it seems to me that once you've  
20 done it with respect to forum selection, that  
21 was the harder question historically.

22 JUSTICE JACKSON: But was it harder  
23 with respect to this issue of federal versus  
24 state? I mean, I would think that the  
25 forum-selection scenario is easier when you're

1     talking about picking among states than the  
2     question of federal to state, which is what is  
3     happening in this dynamic with respect to choice  
4     of law.

5             MR. WALL:  So I think I disagree with  
6     that, Justice Jackson.  I don't see a difference  
7     for Wilburn Boat purposes.  And, if anything,  
8     it's less clear to me that the law on forum  
9     selection in admiralty was well-established as  
10    of the time of The Bremen as it is that there's  
11    a well-established rule on choice of law now  
12    that existed both pre- and post-Bremen.  So I  
13    think this is an easier case than The Bremen in  
14    sort of both of those -- in both of those  
15    senses.

16            And I do just want to say, Justice  
17    Jackson, I see the problems and the Restatement  
18    acknowledges and so does The Bremen, if you pick  
19    out some really odd law, right, that's just  
20    designed to mean they have no remedy, but, here,  
21    they picked out a standard law that gives them  
22    remedies.  They still have two claims.  They  
23    have traditional contract remedies, breach of  
24    contract, breach of the implied duty of good  
25    faith and fair dealing.

1           The only thing they don't have are the  
2   more idiosyncratic Pennsylvania claims. But,  
3   again, it's not as if Great Lakes picked out  
4   some law in an effort to -- for it to be unfair.

5           JUSTICE KAGAN: Well, you can call it  
6   --

7           JUSTICE BARRETT: You've admitted --

8           JUSTICE KAGAN: -- idiosyncratic, but  
9   what they really are is consumer-protective as  
10   against insurance companies in situations of  
11   this kind. And, you know, we know that there's  
12   no federal substantive principle that conflicts  
13   with those Pennsylvania statutes.

14           So the question is, as between two  
15   state laws, why we should necessarily allow the  
16   New York law to apply when everything about this  
17   case screams Pennsylvania? And I would have  
18   thought that what Wilburn Boats stands for,  
19   again, in its essence, is, you know, when that's  
20   so, it should be the state regulating insurance  
21   that gets to have its way.

22           MR. WALL: So I guess, Justice Kagan,  
23   what I'd say is, if you picked up only Wilburn  
24   Boat, I could understand the other side's  
25   argument. If you picked up only Bremen and

1 Carnival, I think we'd clearly be right.

2               So then the question is, well, which  
3 distinction makes more sense? Distinguishing  
4 between forum selection and choice of law or  
5 distinguishing between maritime insurance and  
6 other maritime contracts?

7               And I think what the other side's  
8 position boils down to -- and maybe I'm wrong --  
9 is that if you have a bill of lading, you're  
10 shipping goods from Europe to the United States,  
11 and you have a shipping contract, you have a  
12 towage into the port contract, you have  
13 employment contracts for the seamen, whether  
14 under Jones Act or otherwise, and you have a  
15 marine insurance contract, I think they're going  
16 to have to acknowledge all the forum-selection  
17 clauses in all the contract generally  
18 enforceable except as against federal public  
19 policy.

20              On the non-marine-insurance contracts,  
21 I think they're going to have to say still the  
22 same test as forum selection, but for the one  
23 choice-of-law clause in the one marine insurance  
24 contract, you'd look at Wilburn Boat and say:  
25 Ah, well, their state should play a role. That

1       seems to me not a sensible result.

2                   And I guess the -- I want to sort of  
3       broaden the lens. You started by saying this is  
4       a dispute between two state laws. And that is  
5       the way the other side sees it. But I think  
6       that ignores a third set of laws, federal law.

7                   And if we're right on the question  
8       that the Court didn't grant, that there's a  
9       federal presumption of enforceability, then  
10      federal law does have something to say here. It  
11      says we want the clauses to be generally  
12      enforced, except fill in the blank. And who  
13      gets to fill in the blank? The federal  
14      sovereign that recognized the presumption --

15                  JUSTICE KAGAN: Well, the federal  
16      sovereign --

17                  MR. WALL: -- or the 50 states?

18                  JUSTICE KAGAN: -- may get to fill in  
19      the blank and still say the presumption is  
20      overridden in a case where everything screams  
21      Pennsylvania and Pennsylvania has substantive  
22      law in the area.

23                  MR. WALL: Except that the federal  
24      sovereign, that wouldn't be a sensible thing for  
25      it to do. And that's never what the Court has

1 thought, Right? The Bremen doesn't say a word  
2 about Florida law. Carnival doesn't say a word  
3 about Florida law. Bisso doesn't say a word  
4 about Florida law. None of these cases talk --  
5 you know, London Assurance came up out of  
6 Pennsylvania. Kensington came up out of SDNY.  
7 None of these cases looked at state law.

8           They all, for -- you know, dating  
9 130-ish years, have looked at federal public  
10 policy because they've said the federal  
11 sovereign wants them enforced, unless they're  
12 going to defeat the purposes of maritime  
13 jurisdiction, which is the whole system that  
14 this is designed to facilitate in the first  
15 place.

16           JUSTICE BARRETT: What's the daylight  
17 --

18           JUSTICE ALITO: Didn't admiralty --

19           JUSTICE BARRETT: -- between the first  
20 step of the presumption and then the overcoming  
21 of the presumption? Because I kind of take your  
22 answer to Justice Kagan to be, well, federal law  
23 wants them to be enforced and so, when you think  
24 about whether it's against federal public  
25 policy, you say, well, they want it to be

1       enforced.

2                   MR. WALL: Unless the chosen law  
3       deprives the parties of remedies altogether or  
4       forces them to go to a really far forum or  
5       adopts some limitations on liability that  
6       disserve the purposes of admiralty. So courts  
7       don't allow you to pick out a law if your chosen  
8       law says, you know, the shipper or the insurer  
9       can only be liable for \$5 or you effectively  
10      have no claim at all. So, if we deprive of you  
11      remedies or we put limitations in place that  
12      fail to deter negligence, federal courts say  
13      that triggers admiralty policy.

14                   But short of that, they're generally  
15      enforceable. So I'll be the first one to say  
16      most of these clauses are going to be  
17      enforceable because the standard clause if you  
18      look across the cases is this one. So, if you  
19      look at Galilea, that's a different insurer. If  
20      you look at Clear Spring, the standard is  
21      entrenched federal admiralty law or, failing  
22      that, New York law. That's the standard clause.

23                   JUSTICE BARRETT: But it's possible --

24                   JUSTICE KAVANAUGH: You don't --

25                   JUSTICE BARRETT: -- then, in Justice

1 Alito's hypothetical, that federal public  
2 policy, you know, the itty-bitty country with  
3 the super-harsh laws, you would concede that  
4 it's possible that federal public policy would  
5 be --

6 MR. WALL: Yes.

7 JUSTICE BARRETT: Okay.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Thomas, anything further?

10 Justice Alito?

11 JUSTICE ALITO: To what extent, if  
12 any, would a federal admiralty court exercising  
13 powers akin to a common law court be able to  
14 adopt a new rule along the lines of Pennsylvania  
15 law as a federal policy?

16 MR. WALL: Justice Alito, you mean  
17 with respect to something like bad faith or  
18 breaching the warranties or something like that?

19 JUSTICE ALITO: Yes. Well, yeah.

20 MR. WALL: So --

21 JUSTICE ALITO: Something that would  
22 cover a situation like this.

23 MR. WALL: -- A federal admiralty  
24 court could. The problem is, if you look at the  
25 considerations that this Court put forward in



1 your opinion for the Court in Dutra for how  
2 federal admiralty courts either recognize or  
3 make federal common law in admiralty, I think  
4 they're going to cut away from Pennsylvania  
5 because they cut in favor of enforcing the  
6 warranties, not in favor of sort of, you know,  
7 lax or lenient compliance.

8 But, if the history were different and  
9 if a court thought it served the purposes of  
10 admiralty, of course, it could create a rule  
11 like that. But I -- I -- I -- I want to be  
12 candid and say I think the history of admiralty  
13 and most decisions go the other way on that.

14 But there's not a federal rule on the  
15 specific issue here. Like, that's navigational  
16 limits, federal. As it's turned out, fire  
17 extinguishers, state. So, you know, I'm not --  
18 not fighting that that goes to state law. It's  
19 just a question of does the parties' choice of  
20 New York law get to govern that question.

21 JUSTICE ALITO: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Sotomayor?

24 JUSTICE SOTOMAYOR: Why does Wilburn  
25 Boat even apply here or to this question at all?

1 I'm not sure it does. So --

2 MR. WALL: I'd be perfectly happy with  
3 an opinion that says it doesn't, but in fairness  
4 to -- to Justice Kagan, if you just picked up  
5 Wilburn Boat, it would tell you that if you  
6 don't have an established federal rule or you  
7 don't need to create one, you look to state law.

8 And if you read the opinion, you'd  
9 think, in marine insurance, the bar for that  
10 would be really high. So, if you didn't have  
11 Bremen and Carnival, I think it would be a  
12 harder case whether there would be an on-point  
13 rule here that you could look to.

14 JUSTICE SOTOMAYOR: Well, we limited  
15 it in Kossick and Kirby.

16 MR. WALL: So, look, I agree. The  
17 Court comes along six years after it in -- in  
18 Kossick, it recognizes a federal rule in  
19 admiralty, it in dicta has some fairly critical  
20 things to say about Wilburn Boat.

21 It seems to side with the concurrence  
22 in the dissent. And it seems to sort of  
23 question whether it's right, but I didn't -- you  
24 know, we're not biting off the holding of -- of  
25 Wilburn Boat.

1                   I mean, you know, I do think there are  
2   good reasons to be critical of the decision. I  
3   do think that it's historical discussion. It  
4   does not match up with the history in -- in  
5   admiralty. And I think it was -- it was a  
6   little thin there.

7                   And Justice Frankfurter's concurrence  
8   has a lot to recommend it, but, you know, I  
9   don't sort of need to win that to be -- to  
10   prevail here.

11                  JUSTICE SOTOMAYOR: Well, then, I  
12   guess you need to win the debate that there's an  
13   established presumption of enforceability for  
14   conflict-of-law choices, correct?

15                  MR. WALL: Yes, that debate I need to  
16   win.

17                  JUSTICE SOTOMAYOR: All right.

18                  MR. WALL: And I guess what I would  
19   say is I have everything on my side except a  
20   decision from this Court because I haven't -- I  
21   have a sort of unbroken history in the lower  
22   courts. I have Bremen and Carnival. And I have  
23   a near consensus in the federal courts on  
24   federal choice-of-law.

25                  So I have everything except this Court

1 confirming, yes, the rule for forum selection  
2 applies equally to choice-of-law, which, by the  
3 way, even the Third Circuit didn't dispute.

4 Again, on sort of narrowest grounds of  
5 decision, the Third Circuit got it right all the  
6 way up until the end where it said under the  
7 public policy prong, you look to state rather  
8 than federal. If you just said it's federal,  
9 rather than state under The Bremen, period,  
10 we're done.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: So if the plaintiff  
13 here were an airline company or a railroad or a  
14 trucking concern, probably the restatement rule  
15 applies, probably Pennsylvania law applies  
16 because of it.

17 Why is this so different?

18 MR. WALL: Well, it may. In some of  
19 those industries, I mean, you have the Federal  
20 Aviation Act. I mean, there are federal  
21 statutes in a lot of those. There is a federal  
22 act, I believe, that covers some interstate  
23 trucking. I mean, it's not that all of those  
24 are just sort of left to state law.

25 But I do agree with you that outside

1 of maritime, the -- the restatement is going to  
2 run the traditional way, because not a federal  
3 enclave, and it will run as between the states.  
4 And I think, Justice Kagan, it's fundamental to  
5 our position that maritime is different and has  
6 long had a different set of rules.

7 And this Court has sort of confirmed  
8 again and again. And Wilburn Boat says what --  
9 you know, even Wilburn Boat says: Well, but if  
10 there's a recognized federal rule or need to  
11 create one, no state law. And that's different  
12 about maritime from all these other areas.

13 So it -- it seems to me, yes,  
14 admiralty is different.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Gorsuch?

17 JUSTICE KAVANAUGH: On --

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh?

20 JUSTICE KAVANAUGH: On the federal  
21 exceptions, again, if we agree with you that the  
22 exceptions are determined by federal law, and I  
23 think you've said that it's just about the  
24 exceptions, well, you don't necessarily need to  
25 be precise to win the case for your client, but

1 we need to be precise in how we write the  
2 opinion.

3 And so I want to ask two things. One,  
4 you don't think that as a matter of federal  
5 policy on exceptions we should look to which  
6 state might have a materially greater interest  
7 than the chosen state in the determination of a  
8 particular issue, correct?

9 MR. WALL: No.

10 JUSTICE KAVANAUGH: Okay. And,  
11 secondly, you have mentioned a couple times. If  
12 the chosen state law deprives the insured of  
13 remedies, and I didn't see that in the brief,  
14 but that might be something you're elaborating  
15 on reasonable basis, or where is that coming  
16 from?

17 MR. WALL: No, sorry, I -- I -- I  
18 thought we tried to say it in both of the briefs  
19 but maybe not very clearly. It does not come up  
20 very often because, as I say, the standard  
21 choices entrenched admiralty law or New York law  
22 in the alternative.

23 So these public policy arguments don't  
24 tend to play themselves out because nobody  
25 thinks that New York law is repugnant to federal

1 law. But in the cases where it has come up,  
2 where you've picked some -- and there aren't  
3 many of them -- what courts have tended to say  
4 is if you have limitations on liability that  
5 fail to deter negligence --

6 JUSTICE KAVANAUGH: So, say in New  
7 York law, say it just chooses New York law, I  
8 just want to make sure I understand this, and  
9 New York law -- keep going.

10 MR. WALL: New York law is not  
11 repugnant to federal policy because there is no  
12 evidence in this case or any other that it  
13 limits liability of marine insurers in a way  
14 that fails to deter negligence or otherwise  
15 deprives insureds of -- of any remedy.

16 JUSTICE KAVANAUGH: Okay, any remedy,  
17 right?

18 MR. WALL: That's right.

19 JUSTICE KAVANAUGH: Not on the  
20 particular issue in dispute?

21 MR. WALL: Well, I mean -- we, again,  
22 courts haven't had to confront it in a case  
23 where you had some remedies but they didn't  
24 allow you to get at it. In all of these cases  
25 because you have New York law, you have the

1 standard contract remedies under New York law.

2 They can claim that Great Lakes is  
3 breaching. They can claim that Great Lakes  
4 breached an implied duty of good faith and fair  
5 dealing. That's typically enough for them to be  
6 able to air these claims in court.

7 So, it -- I mean, again, they picked  
8 out New York law. I mean, this is not an --

9 JUSTICE KAVANAUGH: Yeah.

10 MR. WALL: -- idiosyncratic or weird  
11 law, so it doesn't tend to come up. But if you  
12 picked out a state's law that didn't allow you a  
13 remedy for your particular claim, it would come  
14 up.

15 I will say, Justice Kavanaugh, I've  
16 read more of these cases than I care to admit,  
17 and I haven't found a single case where that's  
18 true.

19 JUSTICE KAVANAUGH: Okay. Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Barrett?

22 Justice Jackson?

23 Thank you, counsel.

24 Mr. Bashman?

25 ORAL ARGUMENT OF HOWARD J. BASHMAN



1                   ON BEHALF OF THE RESPONDENT

2                   MR. BASHMAN: Mr. Chief Justice and  
3                   may it please the Court:

4                   In this maritime insurance case, the  
5                   Court considers whether a state choice-of-law  
6                   provision in an insurance policy is subject to  
7                   the same fundamental public policy exception  
8                   that applies everywhere outside of admiralty or  
9                   whether only a strong federal public policy will  
10                  suffice to overcome the insurance company's  
11                  state choice-of-law clause.

12                  The Third Circuit reached the correct  
13                  result here for two reasons. First, under  
14                  Wilburn Boat, state law applies. As a result,  
15                  the fundamental public policy of the state with  
16                  the greatest connection to the dispute can  
17                  override the contractual choice-of-law  
18                  provision, selecting the law of another state.

19                  And, second, should this Court see a  
20                  need to announce a federal common law rule to  
21                  govern these circumstances, notwithstanding  
22                  Wilburn's Boat -- Wilburn Boat's decision to  
23                  leave maritime insurance regulation to the  
24                  states and to Congress, which has opted not to  
25                  intervene.

1           This Court should adopt a restatement  
2   second conflict of laws, Section 187, as the  
3   federal rule.

4           By contrast, the rule that Great Lakes  
5   urges is neither a judicially-established  
6   federal maritime insurance rule, nor is it even  
7   a rule created for the circumstances of this  
8   case. Great Lakes' rule arose in the vertical  
9   choice-of-law scenario, involving whether  
10   parties to a non-insurance maritime contract  
11   could replace applicable substantive federal  
12   admiralty law with the state law they preferred  
13   instead.

14           This case, on the other hand, involves  
15   a horizontal choice-of-law inquiry between the  
16   laws of two co-equal states. Both sides agree  
17   that substantive federal admiralty law does not  
18   preclude Raiders' Pennsylvania law  
19   counterclaims.

20           So why should federal public policy  
21   impact or restrict the choice-of-law analysis in  
22   any way? I welcome the Court's questions.

23           JUSTICE THOMAS: Counsel, you seem to  
24   rely quite a bit on Wilburn, but we've had  
25   Kossick and Kirby since then and you seem to shy

1 away from those two cases that seem to suggest  
2 that we've cut back on Wilburn.

3 MR. BASHMAN: I -- I don't think that  
4 in the area involved in this case that I see any  
5 consensus in the lower federal courts that  
6 Wilburn Boat has, in fact, been cut back upon.  
7 So we believe that -- that it fully applies to  
8 the circumstances of this case, which -- which  
9 is, again, maritime insurance.

10 And -- and, in fact, by arguing that  
11 only federal policy can defeat a maritime  
12 insurance policy state choice-of-law clause, my  
13 friend on the other side is not nearly seeking  
14 to evade Wilburn Boat, but to affirmatively use  
15 it to harm policyholders, exactly the opposite  
16 result of what that case was seeking to achieve.

17 It's because of the Wilburn Boat  
18 decision to leave maritime insurance regulation  
19 to the states that neither this Court nor other  
20 federal courts have been making federal policy  
21 relevant to the enforcement of -- of maritime  
22 insurance terms and conditions.

23 Using the absence of such federal  
24 maritime insurance policy against insurance  
25 policyholders, Great Lakes would leave such

1 policyholders worse off than if Wilburn --

2 JUSTICE THOMAS: Well --

3 MR. BASHMAN: -- Boat never even was  
4 decided.

5 JUSTICE THOMAS: -- the -- Wilburn was  
6 a little bit different. I mean, you -- you had  
7 two states there. You had Texas and Oklahoma.  
8 It's a land-locked lake. And I think Justice  
9 Frankfurter pointed out the problem of taking a  
10 case about a houseboat on a -- on a lake too far  
11 and applying it to maritime shipping would be a  
12 problem.

13 And it would seem that Kossick and  
14 Kirby reflects that concern.

15 MR. BASHMAN: Well -- well, again, you  
16 know, my -- my answer is that the core holding  
17 of Wilburn Boat in -- in my understanding of it  
18 has remained good law. And so -- and I think,  
19 you know, certainly there was no issue in  
20 Wilburn Boat about whether there were a majority  
21 of justices that supported the majority opinion.  
22 There -- there was.

23 And so, you know, as much as some of  
24 your separate writings are no doubt incredibly  
25 erudite, I think everybody recognizes where you

1 have a majority opinion that --

2 JUSTICE KAVANAUGH: But there's --  
3 there's subsequent majority opinions in The  
4 Bremen and Carnival, which I think the other  
5 side highlights as important to the overall  
6 picture here. And since those cases, lower or  
7 federal courts on choice-of-law have largely  
8 decided that you shouldn't have one being  
9 decided by federal, namely, forum selection, and  
10 choice of law being state law.

11 So how do you respond to the idea that  
12 the -- when you take Justice Thomas's question  
13 and broaden it out to the present day, you have  
14 a much more nuanced picture?

15 MR. BASHMAN: Certainly, Justice  
16 Kavanaugh.

17 To -- to begin with, The Bremen and  
18 Carnival cases were not insurance cases. They  
19 -- they do not state a judicially entrenched  
20 federal maritime insurance law. So -- so it's  
21 my position, to begin with, that that's what you  
22 need and that's what Wilburn Boat says that you  
23 need.

24 And not some just otherwise applicable  
25 maritime law that applies outside of insurance.

1 For -- for example, if the first case that came  
2 before this Court were to decide, in -- in the  
3 non-insurance context, when should a  
4 choice-of-law clause be enforceable or not,  
5 that, for purposes of Wilburn Boat, is not a  
6 holding that -- that would necessarily be  
7 applicable in the insurance context. Wilburn  
8 Boat recognized, for lack of a better term, a  
9 sort of insurance exceptionalism where -- where  
10 this Court will defer to the states.

11 The -- the -- also, those two cases  
12 did not involve choice of law. The Bremen  
13 tangentially recognized that choice of forum  
14 might control choice of law. But -- but as my  
15 friend on the other side has conceded, those --  
16 those are two different things. And if someone  
17 is going to ask me, you know, what's the  
18 difference between choice of law and choice of  
19 forum, or a forum-selection clause, I mean, I --  
20 I think that essentially it's -- it's  
21 self-evident.

22 But in the insurance context,  
23 forum-selection clauses are even -- are viewed  
24 as even more pernicious. There are numerous  
25 states that don't allow an insurance company to

1 dictate --

2 JUSTICE KAVANAUGH: Doesn't that hurt  
3 your argument, then, though, that -- that  
4 despite that -- and I think you're right on that  
5 point -- The Bremen said forum-selection clauses  
6 are a federal law issue?

7 MR. BASHMAN: It didn't say it was a  
8 federal law issue for purposes of insurance  
9 cases because it wasn't an -- an insurance case.  
10 And -- and so I think that when the insurance  
11 case arises --

12 JUSTICE GORSUCH: Well -- well, why  
13 would that make a difference? That -- what --  
14 let's put the narrative out this way: Wilburn  
15 Boat's about substantive insurance provisions,  
16 okay. Bremen, Carnival, about procedural  
17 issues, where a case is going to be litigated,  
18 how it's going to be litigated. You point out  
19 that the forum-selection clause is a harsher  
20 one, and yet we don't look to state law there.

21 Why -- why -- I -- I guess maybe I'm  
22 repeating Justice Kavanaugh, but, gosh, what's  
23 -- what's -- what's the point of distinction why  
24 we would maybe listen to forum-selection clauses  
25 in all areas except for maritime insurance?

1                   MR. BASHMAN: Well, I -- I -- I think  
2                   -- I think the point is that's -- there is no  
3                   established federal rule applying in the  
4                   maritime insurance context to forum-selection  
5                   clauses.

6                   JUSTICE GORSUCH: Yeah. But --

7                   MR. BASHMAN: So the argument would be  
8                   open.

9                   JUSTICE GORSUCH: But the question --

10                  MR. BASHMAN: Under --

11                  JUSTICE GORSUCH: Everybody agrees  
12                  it's -- you know, fine, it's open. Why would --  
13                  why would we say that state law would control  
14                  there?

15                  MR. BASHMAN: Because the need for  
16                  states to protect insurance policyholders in the  
17                  insurance context from sharp practices involving  
18                  choice-of-forum clauses --

19                  JUSTICE GORSUCH: Or one would could  
20                  say we have very sophisticated entities who are  
21                  engaged in trade on the high seas. These are  
22                  bespoke agreements, this isn't GEICO, and, you  
23                  know, they -- they make their choices, they live  
24                  with them.

25                  MR. BASHMAN: This -- this case is not



1 -- does not involve a -- a bespoke agreements.

2 The other side --

3 JUSTICE GORSUCH: Well, I mean, it  
4 also doesn't involve a houseboat in Oklahoma  
5 either, right?

6 MR. BASHMAN: The other side keeps  
7 saying that we agreed to the choice-of-law  
8 provision, which I guess is technically accurate  
9 that we did not cancel the insurance policy  
10 after we received --

11 JUSTICE GORSUCH: We're talking about  
12 a yacht floating around in the Bahamas. We're  
13 not talking about, you know, someone's motor  
14 home or a -- a floating houseboat.

15 MR. BASHMAN: But -- but if I could  
16 address the substantive procedure aspect of Your  
17 Honor's question?

18 JUSTICE GORSUCH: Yes, please. Yeah.  
19 I guess that's where -- I'm sorry, we got a  
20 little --

21 MR. BASHMAN: Oh, that's okay.

22 JUSTICE GORSUCH: -- sideswiped, but  
23 that's what -- that is my concern. Why would --  
24 why would it make a difference if -- if you lose  
25 in other procedural areas and all other areas of

1 law, why would you win in this one?

2 MR. BASHMAN: This Court recognizes  
3 that choice of law is substantive, to -- to  
4 begin with. And then, secondly, this -- the  
5 issue presented in this case --

6 JUSTICE GORSUCH: Forum selection is  
7 procedural, but choice of law is substantive?

8 MR. BASHMAN: Right.

9 JUSTICE GORSUCH: Explain that to me.

10 MR. BASHMAN: Which -- which is why  
11 the -- which is why under the cases that we  
12 cite, it applies in diversity cases. The -- the  
13 federal court follows the state choice-of-law  
14 procedure of -- of the forum state in diversity  
15 cases. This Court ruled that the reason for  
16 that is because choice of law is substantive and  
17 outcome determinative.

18 And -- and so the other side says -- I  
19 want to contrast this case with -- with a case  
20 in which the Great Lakes Insurance policy says  
21 the insured cannot bring insurance bad faith  
22 claims. It cannot bring state unfair trade  
23 practices claims, which is what they're saying  
24 the work that the New York choice-of-law  
25 provision accomplishes for them.

1                   Under Wilburn Boat, where you have  
2     substantive provisions, which is precisely what  
3     Wilburn -- Wilburn Boat involved, you can't sell  
4     the boat, you can't use it for commercial  
5     purposes, this Court recognized that otherwise  
6     applicable law could override those substantive  
7     provisions. Why -- why the outcome should be  
8     different where it's accomplished through a  
9     choice-of-law clause, the other side never  
10    really fully explains.

11                  JUSTICE KAVANAUGH: Can -- can I  
12    broaden it out --

13                  JUSTICE BARRETT: Mr. Bashman --

14                  JUSTICE KAVANAUGH: Oh.

15                  JUSTICE BARRETT: Just one quick  
16    question. I just want to give you a chance to  
17    explain the shift in argument, because below it  
18    seems that you did say that federal law -- there  
19    was a presumption of enforceability to the  
20    choice-of-law clause. That's what I thought  
21    when we granted cert. And then I was confused  
22    when I started reading your brief, and it was  
23    all about Wilburn Boat.

24                  MR. BASHMAN: I looked at the cites  
25    that the other side had in its reply brief for

1 the proposition that -- that we had admitted  
2 that choice-of-law is presumptively enforceable  
3 as a matter of federal law. And none of those  
4 establish any such thing.

5 Raiders' Third Circuit briefs did not  
6 agree that a choice-of-law clause is  
7 presumptively enforceable as a matter of federal  
8 law. The term doesn't even appear in those  
9 briefs.

10 JUSTICE BARRETT: Did you accept it as  
11 a premise, even if you didn't say -- even if you  
12 didn't affirmatively make the argument, you  
13 know, these are presumptively enforceable under  
14 federal law? I mean, it seems to me that was  
15 the premise of the QP. It seems like that was  
16 the premise below. It was certainly the premise  
17 of the Third Circuit's decision.

18 MR. BASHMAN: I -- I push back firmly  
19 on the suggestion that it's the premise of the  
20 QP. The QP says, as -- as a matter of -- and I  
21 don't have it at hand, but -- but my  
22 recollection of it is whether state law is -- is  
23 relevant to -- to determining whether a state  
24 choice-of-law provision in -- in a maritime  
25 insurance contract --

1 JUSTICE BARRETT: It says: "[...] can  
2 a choice-of-law clause in a maritime contract be  
3 rendered unenforceable if enforcement is  
4 contrary to the strong public policy of the  
5 state whose law is displaced?" So that kind of  
6 -- sorry, I omitted the key first clause.  
7 "Under federal admiralty law, can a  
8 choice-of-law clause" -- the rest of what I  
9 said.

10 MR. BASHMAN: Right. They put a lot  
11 of weight on that introductory phrase that Your  
12 Honor omitted. And -- and our answer is Wilburn  
13 Boat is a federal admiralty law case. Our  
14 argument under Wilburn Boat step 2 that's --

15 JUSTICE BARRETT: Well, I thought your  
16 argument was that Wilburn Boat, in fact, wasn't  
17 a federal admiralty case because I don't even  
18 take it -- well, I guess I should ask, do you  
19 accept Justice Kagan's premise that Wilburn Boat  
20 adopted state substantive law as the federal  
21 common law rule, or is it your position that  
22 Wilburn Boat said this is a state law matter and  
23 federal law has nothing to say?

24 MR. BASHMAN: I -- I don't know that  
25 there's a whole lot of difference between those

1 two --

2 JUSTICE BARRETT: I think there's a  
3 difference.

4 MR. BASHMAN: -- positions. But --  
5 but what Wilburn Boat said, as I understand it,  
6 is -- is that if you have a maritime insurance  
7 case, you undertake the inquiry that it  
8 requires, and -- and if there is no -- if -- if  
9 there's no judicially established federal  
10 maritime insurance rule, and there's no desire  
11 to create one, then -- then state law applies.

12 And -- and so, so much of the argument  
13 here today is, is there a judicially established  
14 federal maritime insurance law? And --

15 JUSTICE KAVANAUGH: Can I ask -- can I  
16 broaden out the question I was asking, which is  
17 can I broaden out the lens to look at what  
18 happened after Wilburn Boat, not necessarily  
19 this Court, but in the industry? So my  
20 understanding is Wilburn Boat was something of a  
21 dislocating decision in the industry.

22 And the -- the response to it, picking  
23 up on Justice Reed's dissent and Justice  
24 Frankfurter's concurrence, by the industry was,  
25 okay, well, we'll use choice-of-law provisions

1     because otherwise there would be all this  
2     uncertainty created by -- by Wilburn Boat. And  
3     choice-of-law provisions started to become  
4     commonplace. You can dispute any of this,  
5     obviously.

6             And then choice-of-law provisions,  
7     particularly following The Bremen, became  
8     accepted as a matter of federal law by federal  
9     courts. And that the -- this would be kind of  
10    Wilburn Boat redux if we go back now and say,  
11    oh, no, that whole experiment for the last  
12    couple generations of choice-of-law provisions  
13    is no good. Do you want to respond to that?

14            MR. BASHMAN: It -- it's not that it's  
15    no good. We -- we -- we freely concede that in  
16    most every instance, a choice-of-law provision  
17    contained in a maritime insurance contract will  
18    be effective.

19            We're -- this case is being fought  
20    over these narrow and difficult-to-satisfy  
21    exceptions.

22            JUSTICE KAVANAUGH: Well, okay. On  
23    that, the big exception is -- is -- is 2(b)  
24    obviously in the Restatement, I think, which  
25    talks about weighing the different interests of

1 the different states. And I understand the  
2 other side to say no, that shouldn't part -- be  
3 part of the inquiry at all.

4 And you say -- and I understand this  
5 position -- no, that has to be a central part of  
6 the inquiry. That's not a narrow dispute.  
7 That's a big deal, I think, in -- certainly, a  
8 big deal in your case, but I think it's going to  
9 be a big deal in some other cases.

10 MR. BASHMAN: Well, this -- this is  
11 the way --

12 JUSTICE KAVANAUGH: And why would --  
13 and why would we look at that? That's really  
14 designed for interstate disputes, not for  
15 maritime law. So why would we look at that  
16 provision of the Restatement at all?

17 MR. BASHMAN: Well, I hate to keep  
18 coming back to Wilburn Boat, but what it says --

19 JUSTICE KAVANAUGH: Keep going.  
20 That -- it's good for you.

21 MR. BASHMAN: -- is that, you know,  
22 in -- in a maritime insurance dispute, if -- if  
23 there's no established federal maritime  
24 insurance policy as a matter of judicially  
25 established, then -- then you do look to -- to



1 state law.

2 Again, as was alluded to --

3 JUSTICE JACKSON: But, here, I guess  
4 isn't the question whether there is such a  
5 policy here? And I'm not clear on your position  
6 with respect to that. Justice Barrett sort of  
7 tried to ask it, so let me -- let me just put it  
8 out there. Is there a federal policy in your  
9 view related to the enforceability of these  
10 kinds of contracts, provisions?

11 MR. BASHMAN: No, there is not. And  
12 -- and it has not -- it doesn't satisfy the  
13 stringent test that Wilburn Boat recognized for  
14 --

15 JUSTICE JACKSON: Did -- did Wilburn  
16 Boat recognize a test for determining when there  
17 is an established policy, or did it just --

18 MR. BASHMAN: Yes.

19 JUSTICE JACKSON: Oh, it did? Okay.

20 MR. BASHMAN: Yes.

21 JUSTICE JACKSON: So what is that  
22 test?

23 MR. BASHMAN: The -- at a minimum,  
24 it -- it's that the showing in favor of allowing  
25 technical defaults by the policyholder to result

1 in a forfeiture of coverage, which was a rather  
2 widespread body of law that existed at the time  
3 Wilburn Boat came out, including earlier  
4 decisions of -- of this Court in the  
5 non-maritime-insurance context that -- that  
6 recognized that principle of law, that all of  
7 that was not enough.

8 And -- and what the other side points  
9 to here we respectfully submit is way less than  
10 the type of showing that Wilburn Boat said  
11 wasn't enough, and -- and the reason that is is  
12 I --

13 JUSTICE SOTOMAYOR: I -- I'm sorry,  
14 counselor. You're -- you're like jumping the  
15 most important step.

16 The issue is whether there's a  
17 presumption of enforceability of a conflict of  
18 law choice, not about whether there's a  
19 presumption of enforceability of a particular  
20 term or substantive terms in a contract, but the  
21 simple question is: Is there a presumption of  
22 enforceability in a choice-of-law provision?

23 And you seem to say, because we, the  
24 Supreme Court, hasn't said it, there can't be.  
25 But, obviously, Bremen put that to rest because

1 Bremen found one, whether there had been one  
2 before or not, it announced that it preexisted  
3 itself.

4 I'm still not sure. You made that  
5 presumption below. The Third Circuit seemed to  
6 have made it. Every lower court who's faced the  
7 question has presumed that there's that  
8 presumption.

9 You haven't given me a reason why in  
10 admiralty law there wouldn't be that  
11 presumption. We want uniform -- uniformity in  
12 maritime interpretation. We want people to be  
13 secure in knowing which laws are going to apply,  
14 not what the substance of those laws are, but  
15 which law is going to apply. Everything that  
16 moved us to find that presumption in the  
17 forum-selection world seems to apply here.

18 So now tell me why it shouldn't  
19 without getting to the unfairness of the  
20 substantive issues.

21 MR. BASHMAN: Right. So -- so Wilburn  
22 Boat weighed many of those exact same concerns,  
23 including the issue with just uniformity,  
24 because an insurance policy that contains  
25 certain substantive provisions might be

1 enforceable in -- in some states that allowed  
2 it.

3 JUSTICE SOTOMAYOR: But that had to do  
4 with the substantive. I'm not talking about  
5 that.

6 MR. BASHMAN: And --

7 JUSTICE SOTOMAYOR: I'm talking about  
8 the choice-of-law versus forum-selection clause.

9 MR. BASHMAN: Well, this -- this case  
10 involves a provision in the insurance policy  
11 that says -- it's a rather lengthy provision,  
12 but it says, if there's no applicable federal  
13 admiralty law, then -- then the law of New York  
14 will apply.

15 And -- and once you get to that stage,  
16 then -- then you're in the state -- state law  
17 world under Wilburn Boat. And -- and the other  
18 side is saying, well, only strong federal public  
19 policy can overcome that. And let me explain  
20 where that rule comes from.

21 The case they cited the most in their  
22 cert petition and continue to rely upon in their  
23 merits briefing is a case from the Fifth Circuit  
24 called Stoot, and -- and that case, it -- it --  
25 I -- I suggest looking at it if you haven't

1     already -- is a non-maritime insurance case  
2     involving a dispute between the owner of an oil  
3     rig and the catering company on the oil rig, and  
4     they have a contract that decided to select  
5     Louisiana law on the issue of indemnification.

6             Under regular federal maritime law, an  
7     indemnification provision in a contract would be  
8     enforceable. But, under Louisiana law, what's  
9     called, I believe, the anti-indemnification oil  
10    field statute of Louisiana, you cannot enforce  
11    an indemnification provision in -- in a case  
12    governed by that Louisiana law.

13            And so the issue before the Fifth  
14    Circuit in Stoot was could the parties replace  
15    substantive federal admiralty law allowing an  
16    indemnification claim with a law of Louisiana  
17    disallowing an indemnification claim. And the  
18    Fifth Circuit said we have to look at federal  
19    public policy to decide whether we'll allow  
20    state law to displace federal law.

21            I know it's a strange scenario  
22    because, in -- in many situations, federal law  
23    necessarily is -- is deemed to be controlling in  
24    the absence -- even -- even if there is  
25    conflicting state law, but the Fifth Circuit

1     said there's not a strong federal policy, so  
2     we'll allow the parties to choose the law. And  
3     -- and they rejected --

4             JUSTICE KAGAN: And -- and just, you  
5     know, thinking about Justice Sotomayor's  
6     question, I take it that you have -- you should  
7     have no great quarrel with the idea of a federal  
8     rule of -- that there's a presumption of  
9     enforceability. Your point is just, well, at  
10    the next step, the question is, what overrides  
11    the federal presumption of enforceability?

12            And your view is that what overrides  
13    it, a la the Restatement rule, is when there's a  
14    particular state law where a state has a -- a  
15    vastly superior interest in a dispute and there  
16    is a state substantive law which federal law  
17    does not at all conflict with.

18            MR. BASHMAN: I -- I agree that --  
19    that that view resolves the case in -- in our  
20    favor for sure. I -- I also understand the  
21    other side to be arguing, you know, on the other  
22    hand, if -- if you have a federal presumption,  
23    then maybe only federal policy reasons ought to  
24    be relevant to that.

25            And -- and I think that, you know, if

1     you look at their cites that say that somehow  
2     we've conceded that away, you know, those --  
3     those cites don't establish that.

4                     And -- and, in fact --

5                     JUSTICE JACKSON: But what -- what's  
6     your answer to that question? I mean, why would  
7     it be the case that we would be in a world in  
8     which state interests or state policy could  
9     override the federal presumption of  
10    enforceability?

11                    MR. BASHMAN: Because this case arises  
12    at -- at the last step of Wilburn Boat where  
13    state law controls, which is how they got in --

14                    JUSTICE JACKSON: No, no, no, I'm just  
15    talking about as a matter of theory. Like, as  
16    a -- so setting aside what -- what Wilburn Boat  
17    -- I'm just trying to understand, one reason why  
18    it would be that the federal exception, you'd  
19    have to have federal interests in the exception  
20    is a couple, one is that we have a general rule  
21    and we have an exception and unless you actually  
22    have sort of the same dynamic working, you could  
23    easily see how the exception could swallow the  
24    rule. You'd never have the rule, right, because  
25    the exception is sort of being established on a

1 different plane. So that's one thing.

2 Another thing is, to the extent we're  
3 talking about federal interests overarching this  
4 entire dynamic, we know, as Justice Sotomayor  
5 says, the federal interests are in uniformity  
6 and predictability and all of those sorts of  
7 things.

8 So, if we have a single federal  
9 spokesperson regarding what is accepted, you're  
10 more likely to advance the interests of  
11 uniformity and predictability, whereas if you  
12 have state interests operating in the exception,  
13 you're going to have all of these different  
14 exceptions popping up at different times and  
15 people aren't going to know what they're doing.

16 So I appreciate that there's a world  
17 in which insurance contracts are different and  
18 they're ordinarily run by the states and each  
19 state has a particular interest, consumer  
20 protection, not, or whatever, but if our entire  
21 kind of framing is about ensuring predictability  
22 and uniformity, why would we have a world in  
23 which we would allow different state policy  
24 interests to be driving the exception in this  
25 way?



1           MR. BASHMAN: Well, I have multiple  
2 points to make in response to that.

3           JUSTICE JACKSON: Sorry, that was a  
4 long question.

5           MR. BASHMAN: Sure. First of all,  
6 that -- that's -- Wilburn Boat weighed the  
7 federal interest in uniformity and said that, in  
8 the maritime insurance area, it did not outweigh  
9 state regulation, which is obviously what this  
10 case involves, as -- as was alluded to when my  
11 friend was up here.

12           Secondly, the type of uniformity that  
13 -- that Great Lakes argues in favor of is -- is  
14 not the sort of uniformity that this Court  
15 ordinarily speaks of in -- in the maritime --  
16 the general maritime law context, where it's  
17 essentially a substantive rule. So as -- as was  
18 alluded to earlier, under the Dutra Group case,  
19 you can't get punitive damages on an  
20 unseaworthiness claim.

21           This -- this -- this case still allows  
22 any maritime insurer to pick whatever choice of  
23 law to apply -- choice of state law to apply in  
24 the absence of federal law. And -- and, again,  
25 that -- there's no other -- in no other way of

1 the law is there a choice-of-law principle that  
2 says, yes, state law controls, but the only  
3 thing relevant in deciding whether the court  
4 should enforce that or not is federal law.

5 This -- this Court, when it decides  
6 admiralty cases, takes a look at the law that  
7 exists out -- outside -- out in the real world  
8 and -- and tries to figure out, you know, what  
9 -- what is a sensible rule of law to apply in  
10 this case? And what I'm telling you is -- is  
11 the rule of law that the other side is seeking  
12 is -- is something that, in the choice-of-law  
13 area, you just don't see anywhere.

14 And I think that's one of the reasons  
15 why the two leading choice-of-law law  
16 professors, even though they filed an amicus  
17 brief at -- at the same time as the other side's  
18 amicus brief, in support of neither party, came  
19 out essentially the same way that we're urging  
20 --

21 JUSTICE KAVANAUGH: Well, they did  
22 that -- the Coyle and Roosevelt brief, is that  
23 what you're talking about? They are they did  
24 that as a matter of federal common law. So they  
25 rejected your premises that -- and they

1 concluded, if -- assuming there's a federal  
2 presumption of enforceability and that the  
3 exceptions are determined by federal common law,  
4 they -- they disagree with you on that.

5 But then I want to ask you about that.  
6 Then they adopt -- they say we should adopt the  
7 Restatement as the federal exceptions. And the  
8 second one of the Restatement, the second  
9 provision, talks about the competing state  
10 interests in the -- in the matter.

11 And the other side says don't do that,  
12 because that Restatement provision was designed  
13 for interstate disputes, and this is maritime.

14 To me, if we get to this, this will be  
15 really important what we say about this, so I  
16 want to give you a chance to respond to that.

17 MR. BASHMAN: Right. I -- I think  
18 that the reason that the law professors are  
19 correct that that Restatement section should be  
20 applied here, which, of course, is an argument  
21 that we also put forth in our brief --

22 JUSTICE KAVANAUGH: Yeah, I agree with  
23 you, it was a backup backup argument there.

24 MR. BASHMAN: Right.

25 JUSTICE KAVANAUGH: So, yeah.

1           MR. BASHMAN: Is -- is that this case  
2 arises in the setting of -- of a conflict  
3 between the law of -- of two states. And that's  
4 what I referred to earlier as the horizontal  
5 choice-of-law conflict.

6           The other side is trying to turn it  
7 into a vertical choice-of-law conflict. But --  
8 but if there was some federal policy that  
9 mattered, we don't dispute that that federal  
10 policy would control. That -- that's what  
11 Wilburn Boat says.

12           But -- but, again, the other side is  
13 trying to pick these cases that arose outside of  
14 the maritime insurance context, that say that  
15 ordinarily we will enforce a choice-of-law  
16 provision. Again, a showing of a smattering of  
17 federal appellate court decisions that Wilburn  
18 -- Wilburn Boat says is not enough to judicially  
19 establish it, to begin with. And -- and they  
20 say let's use that as the main federal rule, and  
21 let's apply it to insurance cases too.

22           Again, if -- if Wilburn Boat were so  
23 easy to evade, you know, it might make you  
24 wonder what -- what's the point of even having  
25 it. But, of course, the other side did not make

1     that their issue --

2                   JUSTICE BARRETT:  Mr. Bashman, can  
3     just I clarify one thing about your answer to  
4     Justice Kavanaugh?  When -- when you say, and  
5     you said this in your brief too, that if federal  
6     policy cared about it, if federal law cared  
7     about it, we would have a rule, are you talking  
8     about -- and I won't try to say the Latin  
9     name -- the utmost good faith issue, or are you  
10    talking about the choice-of-law issue?  Because  
11    it kind of sounded to me, and in your brief and  
12    today, that you're talking about the utmost good  
13    faith issue, which is different.

14                  MR. BASHMAN:  So this case -- we've  
15    been arguing this case for quite a little bit  
16    now.  This case involves whether my client can  
17    maintain certain counterclaims under  
18    Pennsylvania law.  And -- and so those are  
19    Pennsylvania law statutory counterclaims.

20                  JUSTICE BARRETT:  Well, but let me  
21    just say it differently.  I understood the  
22    utmost good faith to bear on whether you could  
23    maintain those claims.  But putting that aside,  
24    I guess what I'm saying is what federal policy  
25    are you talking about when you say federal law

1 doesn't care? Are you talking about the  
2 substance of your claims, your counterclaims, or  
3 are you talking about the choice-of-law?

4 MR. BASHMAN: I'm -- I -- I guess to  
5 answer that directly, what -- what the other  
6 side's position is, is that there's generally no  
7 federal policy that would support overcoming a  
8 choice-of-law provision in the maritime  
9 insurance context. And, again, I lay that at  
10 the feet of Wilburn Boat, which said we're not  
11 going to create federal policy by --

12 JUSTICE BARRETT: So you -- I don't  
13 want to derail you totally from Justice  
14 Kavanaugh. So your answer to me is that you are  
15 talking about federal law not caring, not having  
16 any federal policy with respect to choice of  
17 law?

18 MR. BASHMAN: Correct.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Thomas, anything further?

22 JUSTICE THOMAS: Just a short  
23 question, Mr. Bashman, to satisfy my curiosity.  
24 Were they able to salvage those twin 12-V 71s?

25 (Laughter.)

1                   MR. BASHMAN: I -- I -- you know, it's  
2     a little bit outside of the record that's in  
3     front of this Court, but -- but I -- I think  
4     that what happened was the boat was taking on  
5     water and -- and may have been run aground to  
6     avoid sinking it so that it could be salvaged  
7     more easily, and -- and the boat is repaired now  
8     and -- and is back in -- in working order.

9                   JUSTICE THOMAS: Okay.

10                  CHIEF JUSTICE ROBERTS: Justice Alito?  
11                   Justice Sotomayor?

12                   Justice Kagan?

13                   Justice Gorsuch?

14                   Justice Kavanaugh?

15                  JUSTICE KAVANAUGH: Just one thing.  
16     When you say federal maritime law doesn't care,  
17     federal law doesn't care about the choice of  
18     law, I mean, I think federal maritime law, as  
19     reflected in decisions of this Court, does care  
20     about predictability and certainty.

21                   And if that's true, then that doesn't  
22     defeat your argument on this point, but I think  
23     it's in tension with your argument that, as a  
24     matter of federal common law, we should weigh  
25     each state's competing interest in the matter.

1 MR. BASHMAN: Again, I think that you  
2 understand our position on that point, which --  
3 which is that the other side's approach does not  
4 --

5 JUSTICE KAVANAUGH: Wilburn.

6 MR. BASHMAN: -- does not dictate --

7 (Laughter.)

8 MR. BASHMAN: -- well, does not  
9 dictate the type of uniformity that this Court's  
10 decisions talk about.

11 JUSTICE KAVANAUGH: Yeah, you --

12 MR. BASHMAN: It's a substantive --

13 JUSTICE KAVANAUGH: I'm going to end  
14 it real quick, but uniformity is different from  
15 predictability and certainty. I think that's  
16 important to keep in mind.

17 MR. BASHMAN: Right. And I'm saying  
18 that uniformity is different than predictability  
19 and certainty and that, again, Wilburn Boat, you  
20 know, weighed those concerns.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Barrett?

24 Justice Jackson?

25 JUSTICE JACKSON: Wouldn't the



1 argument that we should adopt the Restatement as  
2 the federal common law -- isn't that in tension  
3 with the point that you're just making, that the  
4 federal law really doesn't care about the choice  
5 of law? In other words, I thought that -- I  
6 thought your point was that federal law is sort  
7 of agnostic about whether it's New York law that  
8 applies or Pennsylvania law that applies, right?  
9 That that's the sort of original starting point.

10 MR. BASHMAN: Right.

11 JUSTICE JACKSON: Which is why we go  
12 in the contract to New York, because that's  
13 their opening paragraph. If federal law doesn't  
14 make it, then you make it New York.

15 MR. BASHMAN: Right.

16 JUSTICE JACKSON: But then -- but then  
17 we have federal law caring about the fact that  
18 you've made that contractual provision and  
19 saying you have to enforce, unless, et cetera,  
20 et cetera. So why isn't that the federal policy  
21 that is sort of driving this?

22 MR. BASHMAN: So -- so to answer the  
23 -- the first part of your question, we -- we  
24 have the adoption of the Restatement as our  
25 fallback argument under what I'll refer to as

1 step 2 of Wilburn Boat, which is if -- if this  
2 Court sees a need to announce a uniform federal  
3 rule, Wilburn Boat made clear that ordinarily  
4 that would not be done, but, rather, that it  
5 should be left to -- to Congress.

6 And -- and I can't say it enough. You  
7 know, Congress is across the street and has  
8 plenary power to overturn Wilburn Boat and 70  
9 years have gone by and it has chosen not to do  
10 so.

11 JUSTICE JACKSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Rebuttal, Mr. Wall.

15 REBUTTAL ARGUMENT OF JEFFREY B. WALL

16 ON BEHALF OF THE PETITIONER

17 MR. WALL: Just a handful of points.

18 Justice Thomas, to your central  
19 question, the boat is available for sale online  
20 if you have a half million dollars.

21 (Laughter.)

22 MR. WALL: And as best I can tell from  
23 the pictures, the engines were salvaged. So --  
24 so don't worry.

25 Justice Barrett, at page 12 of the Op,

1     they recite the well-established maritime  
2     principle that these choice-of-law clauses are  
3     generally valid unless unreasonable or unjust.  
4     And then it's all a debate, at the cert stage as  
5     it was in the lower courts, about when the sort  
6     of general validity or presumption can be  
7     overcome.

8             The presumption was never at issue in  
9     the case. I think, you know, we can go back and  
10    forth on the quotes from the brief. I feel good  
11    about them, but I think, reading the briefs in  
12    context, that was never at issue in the case.

13            As a -- and the Court did not grant  
14    the broader first QP in the petition. It only  
15    granted the narrower second QP on how to work  
16    the exception.

17            If the Court agrees that there is a  
18    presumption, set aside, Justice Kagan, Bremen  
19    and Wilburn Boat. And if you were just asking,  
20    well, how would it work, if you had no  
21    choice-of-law clause in the contract, you'd  
22    apply federal choice-of-law rules. That's this  
23    Court's decision in Lauritzen, all federal.  
24    It's not diversity, it's not Klaxon, you don't  
25    look to state law.

1                   There's a federal choice-of-law test  
2     in admiralty. All right. We put the  
3     choice-of-law clause in the contract, what now?  
4     We have a presumption. Well, it wouldn't be  
5     much of a presumption if federal law goes, if 50  
6     states could just set it aside. That's Justice  
7     Jackson's point.

8                   And even looking at the facts of this  
9     case, it seems to have a fairly international  
10    flavor. You have a German insurer. You have an  
11    insured in Pennsylvania that designates an agent  
12    in the contract in Florida and the boat can  
13    travel up and down the Eastern Seaboard and the  
14    Bahamas. Nowhere else.

15                  That's the navigational limit. That  
16    sure triggers some interests of Pennsylvania but  
17    it doesn't seem like the only state in play,  
18    and more importantly, it seems like the sort of  
19    national and international thing that triggers  
20    the broader purposes of maritime.

21                  But even if you didn't buy all of  
22    that, we do have The Bremen. The best reading  
23    of The Bremen is that public policy is federal  
24    public policy, not state public policy.

25                  Mr. Bashman agrees that forum

1 selection clauses are even more pernicious. If  
2 that's right, then having adopted the rule with  
3 respect to The Bremen, it seems to me easier on  
4 the choice-of-law side to say you should have  
5 exactly the same rule.

6 Then the move is, but it's an  
7 insurance case. But we don't do that for forum  
8 selection clauses. We don't have The Bremen  
9 test for all maritime contracts that aren't  
10 marine insurance. Every bill of lading, every  
11 towage contract, every employment contract, we  
12 have The Bremen test across the board, so why  
13 would we distinguish on the choice-of-law side  
14 and have The Bremen test for non-insurance  
15 maritime contracts, but The Bremen looking to  
16 state policy for marine insurance contracts?

17 I think all of that should make the  
18 Court skeptical of Wilburn Boat, but even if you  
19 don't approach it through the lens of course  
20 Kossick and Kirby and Dutra, you could simply  
21 say, we cleared the high bar in Wilburn Boat and  
22 Bremen and for exactly the same reasons, we  
23 clear it again here, because there is a tradeoff  
24 in this contract.

25 It has a forum selection clause that

1 is a favorable forum for the plaintiffs. They  
2 get to sue in Pennsylvania. It picks out a  
3 neutral law, a German company picked the U.S.  
4 state to which it had the most ties, where it  
5 has American trust accounts, where it's  
6 designated as a surplus lines insurer and where  
7 it has its agent for service of process.

8 It picked a stable, well-developed  
9 body of both commercial and maritime law, the  
10 state where it has the most substantial  
11 connections which ex ante we should think should  
12 not be unfair to the policyholder at all.

13 Why not treat those clauses as a  
14 package? They should be generally enforceable  
15 as a matter of federal law unless they offend  
16 federal public policy.

17 They don't here, Justice Kavanaugh.  
18 There's no argument that they do. So although I  
19 tried to articulate the limits earlier, I don't  
20 think the Court needs to -- to get into them or  
21 to catalogue them here. All you have to say is  
22 that for the same reasons as The Bremen, it  
23 serves federal interests in maritime.

24 It gives you uniformity so that you  
25 know that your clause will be enforced without

1     having to try to figure out 50 states' laws. It  
2     allows the insured a price in a predictable way  
3     which lowers the premium for the insured.

4             That's not just speculation. You look  
5     at the policy here. It's a pretty reasonable  
6     premium for what is a pretty substantial policy,  
7     but it comes with limits, limits they agreed to  
8     when they were renewing the policy back in 2016,  
9     including the fire extinguisher and it gives an  
10    administrable test for courts.

11            All of this, as The Bremen said,  
12    accords with ancient principles of freedom of  
13    contract. It's the right answer in federal  
14    admiralty.

15            CHIEF JUSTICE ROBERTS: Thank you,  
16    counsel. The case is submitted.

17            (Whereupon, at 12:45 p.m., the case  
18    was submitted.)

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## Official - Subject to Final Review

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